ern public sentiment on the slave question at the time the case was presented for decision. In view of the decision in this case, the governors of various states have at various times refused to surrender persons charged with crimes in other states, and the case of ex-Governor Taylor of Kentucky obtaining refuge in Indiana is still fresh in the public mind. It being understood that rendition could not be compelled, and the governor of West Viriginia having refused to surrender to Kentucky one Mahon charged with murder, a posse of citizens went to West Virginia, kidnaped Mahon, and surrendered him to the sheriff in Kentucky to be held to answer the charge of murder. A petition by Mahon to the United States courts for release on writ of habeas corpus was denied by the Supreme Court of the United States on the same ground as in the *Pettibone* and *Moyer cases;* and the decision in the case of *Kentucky* v. *Dennison* would seem in sense to justify the action of the court, though that decision was not mentioned. *Mahon* v. *Justice,* 127 U. S. 712, 32 L. Ed. 287, 8 Sup. Ct. Rep. 1204.

In the cases now under consideration the further additional features were involved: 1, the public officials were parties to the proceeding to get custody of the petitioners; and, 2, petitioners were not fugitives from justice, even admitting their guilt, unless it could be said that by conniving at the murder of Steunenberg in Idaho they were constructively there, and by remaining out of the state they constructively fled from justice. This theory of constructive flight has already been repudiated by the Supreme Court of the United States in *Hyatt* v. *New York,* 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

It is believed that the present state of the law is an inducement to kidnaping and lawlessness, and that congress should provide such remedy as may be to cure the defect. J. R. R.

WHEN A PUBLIC OFFICER MISAPPROPRIATING PUBLIC FUNDS IS NOT AN EMBEZZLER.—An indictment charged that David E. Sherrick, Auditor of the State of Indiana, being then and there charged and intrusted with the collection, receipt, and safe keeping of moneys, funds, etc., for the state, did receive for the state, funds amounting to $1,000,000 and on June 30, 1905, feloniously converted to his own use $120,000 thereof. This was money received by him, as such auditor, from insurance companies. Indiana, by statute (§ 8477), requires foreign insurance companies, doing business in the state, to pay certain insurance taxes *into the treasury of the state,* based on reports made to the state auditor. For many years the state auditors had been collecting the insurance taxes and thought they were doing what the law required. On the back of the statements that had been sent to the insurance companies, year after year, was the inferential direction to pay the money to the auditor. This sentence on the back of the statement purported to be taken from the tax laws. Under another provision of the statute (§ 389), providing that whoever being charged or in any manner intrusted with the collection or disbursement of funds belonging to the state converts the same to his own use shall be guilty of embezzlement, the defendant was indicted and convicted. *Held,* that, since under the statute, providing *that the money should be paid into the treasury,* the state auditor had

no authority to collect such taxes in his official capacity, a payment to him by the insurance companies operated as a payment to their own agent, so that the auditor's failure to account therefore to the state did not constitute embezzlement. *Sherrick* v. *State* (1906), — Ind. —, 79 N. E. Rep. 193.

This recent decision by the Supreme Court of Indiana is a very interesting one and raises four important questions: viz., First: May a public officer, in such a case, of right, demand a bill of particulars as a means of obtaining information as to how, and from whom and on what account, the property alleged to have been converted came into his hands. *Held,* that he cannot, for the code does not recognize a bill of particulars. Acts 1905, p. 601, c. 169, § 167. Any failure in the indictment to reasonably apprise the defendant of what he is required to meet, may be reached by motion to quash. Acts 1905, p. 626, c. 169, § 194. Under the adjudications in some states, the right to call for a bill of particulars arises, not from a statute, but from the inherent power of the court, to be exercised in any case, when from the peculiar nature of the case, justice would be greatly imperiled without the advanced information obtainable through a bill. WHART. CR. PL. & PR., § 702; BISH. CR. PROC., § 643; *People* v. *Jaehne,* 4 N. J. Cr. R. 161; *State* v. *Wooley,* 59 Vt. 357; *People* v. *McKinney,* 10 Mich. 54; *Commonwealth* v. *Snelling,* 15 Pick. (Mass.) 321; *Westbrooks* v. *State,* 76 Miss. 710. That it rests within the sound judicial discretion of the trial court, subject to review on appeal only for its abuse. *State* v. *Davis,* 38 Fla. 169. Another reason for not allowing the bill is that, the auditor of state, being his own master, and pursuing his own methods, is the only person who knows and can know the details of his office, and is in no position to ask for that information which he has or has the opportunity to have. *People* v. *McKinney,* 10 Mich. 54; *State* v. *Munch,* 22 Minn. 67.

Second: Is the defendant within the class designated by the statute (§ 399 *supra*)? It is observed that the statute (§ 8477 *supra*), does not in terms provide to what officer or person the taxes due the state from foreign insurance companies shall be paid; but it does provide that such taxes *shall be paid into the treasury of the state.* It is fundamental that, an offense not within the words of the statute cannot be adjudged a crime because within the reason. MARSHALL, J., in *United States* v. *Wiltberger,* 5 Wheat. 76. Penal statutes can reach no further in meaning than their words. *Johns* v. *State,* 19 Ind. 429; *State* v. *Meyers,* 56 Ohio St. 340. For example, a statute making the county treasurer who converts the public moneys in his custody guilty of embezzlement, cannot be extended to embrace his deputy, *State* v. *Meyers,* 56 Ohio St. 340; so an officer not charged by law to collect and who has no right to the public money, cannot be convicted of embezzling money received under color of his office, though he falsely represented that he was entitled by virtue of his office to receive it. *State* v. *Bolin,* 110 Mo. 209. The act of Congress which makes it embezzlement for any person employed in the U. S. mint to convert any of the metals used in coinage, does not apply to a clerk employed but whose duties had nothing to do with the metals in relation to coinage. *Commonwealth* v. *Hutchinson,* 2 Pars. Sel. Eq. Cas. (Pa.) 384. Under the laws of Ohio a county auditor is not

an officer charged by law with the possession or custody of money belonging to the state, and an indictment which charged the defendant, a county auditor, with converting money which belonged to the state, which money had come into the possession and custody of the defendant by virtue of his office, was an insufficient charge of embezzlement. *State* v. *Newton,* 26 Ohio St. 265. When penalties are denounced against a particular class, a description of the class, and of the defendant as coming therein, are essential elements of the crime and must be charged and proved. *Moore* v. *State,* 53 Neb. 831.

Third: Are insurance taxes in the hands of the auditor, the state's money? It is manifest from the various statutes that it is the general policy, as established by the system of checks and balances, that the auditor of state shall collect and receive no moneys for the state, but fees for official services rendered by him. Rather than a receiver of public moneys, his duties are akin to those of a watchman who stands at the door of the state treasury, and without whose knowledge and consent, except in a few instances, no public moneys can legally get into or out of the state treasury. He has no duty or authority that is not conferred by statute. The insurance companies were bound to know the auditor's authority. Under these statutes, therefore, there is no ground for saying that the auditor of state was charged or intrusted by law with the collection and receipt of foreign insurance taxes; and, it not being his duty "enjoined by law," if he assumed to collect them, his acts were the acts of an individual and not of a public officer. The auditor, in other words, was the agent of the insurance companies and not of the state. *Bowers* v. *Fleming,* 67 Ind. 541; *Warswick* v. *State,* 36 Tex. Cr. R. 63, 65. Nor does the general authority conferred upon the auditor of state by statute, "to direct and superintend the collection of all moneys due the state," warrant his collection and receipt of these insurance taxes. This authority to direct and superintend the collection cannot, in the presence of direct and positive directions to the contrary, be held to include the power to personally collect and receive. To constitute embezzlement under § 389 *supra,* two things must concur: It must be shown that the money converted was the property of the state, and that it came into the possession of the accused according to the law. *Brady* v. *State,* 21 Tex. App. 659; *State* v. *Johnson,* 49 Ia. 142. Here, then, the money converted did not come into the hands of the auditor according to the law and therefore did not become the property of the state.

Fourth: Having solicited and received payment of foreign insurance taxes, as auditor of state, will such auditor, in the prosecution by the state for such conversion, be heard to say that the money so received was not the money of the state? The doctrine of estoppel is so novel in criminal procedure, and so inconsistent with the fundamental principles of criminal law, that such celebrated authorities on criminal law as WHARTON and RUSSELL, and on the law of estoppel as BIGELOW and HERMAN, take no notice of it whatever. Estoppel is purely a defensive weapon, having its origin in equitable principles, and is designed to supplement or aid the law in accomplishing justice, where without its assistance, injustice may be done. Its purpose

is to preserve rights previously acquired, not to create new ones. *Emmons* v. *Harding,* 162 Ind. 154, 160; *Lindsay* v. *Cooper,* 94 Ala. 170. The argument on the part of the prosecution, followed to its logical conclusion, comes to this: "The state as the injured party is not entitled to maintain this prosecution because the money alleged to have been converted was the money of the insurance companies. However, to secure the auditor's punishment, the state has the right to invoke the interposition of estoppel to exclude proof of a fact that would establish the defendant's innocence of the particular crime for which he is being tried." But, the true rule was stated by HADLEY, J., in the principal case, "an offense not within the words cannot be adjudged a crime because within the reason or spirit, and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a certain class of people, is estopped from denying that he is within that class." *Moore* v. *State,* 53 Neb. 831, 74 N. W. 319; *State* v. *Bailey,* 57 Neb. 204, 77 N. W. 654. R. L. B.

WHEN A DISCHARGED TEACHER MAY RESORT TO THE COURTS.—The plaintiff entered into a contract with the defendant school district whereby he was employed to teach a school for a period of nine months. Before a third of the term had expired he was discharged. The defendant contended that an appeal to the county superintendent, and from his decision to the state superintendent, were conditions precedent to the right to maintain an action upon the contract, and since the appeal was not made plaintiff could not recover. *Held,* that the appeal was a condition precedent and, therefore, the plaintiff was not entitled to recover. *Van Dyke* v. *School Dist. No. 77 of Lewis County* (1906), — Wash. —, 86 Pac. Rep. 402.

Ballinger's Ann. Codes & St., § 2318, declares that "any person aggrieved by any decision * * * of the board of directors may, within thirty days after the decision * * * appeal therefrom to the county superintendent * * * ." The court held that "may" as here used should be construed in a mandatory sense. In support of this view is cited 20 AM. & ENG. ENCY. LAW (2nd Ed.) 237. The writer can find no authority for such an interpretation. On the contrary it is said that "may" cannot be construed in a mandatory sense except to give effect to the clear intention of the legislature; and if there is nothing in the provision to require an unusual interpretation its use is merely permissive. There seems to be no provision in this statute to require any other than the customary meaning. But on page 238 of the above reference are the following words, "where a statute requires that an individual or individuals may do a certain act or have a certain remedy which is intended for his or their own benefit, he or they will have a discretion to do the act or pursue the remedy or to refrain therefrom." This seems to cover the principal case. The statute is permissive and for the benefit of those aggrieved. Here no public interests or rights are concerned and therefore the statute in regard to appeals is optional. "The words shall or may when used in a statute, are imperative only when the public interests and rights are concerned; but when a statute declares that an individual or individuals shall or may do a certain act, or have a certain remedy, which is intended